No. 16089

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION NO. 13-433, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151 *et seq.*)[1] for enforcement of the Board's order issued on February 20, 1957, against International Woodworkers of America, Local Union No. 13-433, AFL-CIO, herein called the Union. The Board's Decision and Or-

[1] The pertinent provisions of the Act are set forth in Appendix B, pp. 24-25.

der are reported at 117 NLRB 405 (R. 12-35, 45-52); its Supplemental Decision (R. 52-56) at 119 NLRB No. 211. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred near Anderson California, where the Ralph L. Smith Lumber Company, the employer involved in this case, maintains a logging operation in the course of producing lumber for interstate commerce (R. 14; 7-8, 10).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly stated, the Union, acting under a lawful agreement requiring union membership as a condition of employment, demanded the discharge of employee Charles Hatfield for his failure to pay an initiation fee and dues. Thereafter Hatfield tendered the initiation fee and dues, and James Gordon, a union shop steward, acting in his official capacity, accepted the tender. The Union repeated its discharge demand after the tender had been accepted, and the Company complied. The issue is whether the Board properly found that the acceptance of the tender by a union agent constituted a waiver by the Union of its right thereafter to demand Hatfield's discharge under its union-security agreement. The facts upon which the Board's findings rest may be summarized as follows:

A. The Union's first request for Hatfield's discharge

In October 1954, the Company hired Charles Hatfield, Paul Thomas, and Walter Spangle for its woods operation (R. 15; 154-155). Late in November of

that year, all three were informed by Robert Crimmins, respondent union's business agent, that they had been employed for 30 days or more and must therefore, in accordance with the union-shop contract then in effect between respondent and the Company, join the Union to retain their jobs. The three men pointed out that the Company was about to shut down its woods operation for the winter, and Crimmins agreed not to insist upon their joining the Union until their employment in the spring. (R. 15-16; 194, 204, 206).

The woods operation reopened about the middle of March 1955 (R. 16; 116). However, no further request to join the Union was made of Hatfield, Thomas or Spangle until May 5.[2] On that date, Ernest Dickey, vice president of the Union and its head steward in the woods, requested the three men to sign membership cards (R. 16; 157-158). Thomas and Spangle complied. Hatfield refused on the ground that he believed he had signed such a card the preceding fall (R. 16; 158, 207).

When Crimmins arrived at the camp later the same day, Dickey told him of his conversation with Hatfield (R. 16; 196). Crimmins searched the union records and found that, so far as he could ascertain, Hatfield had neither applied for membership

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[2] James Gordon, shop steward in the section of the woods in which these three men were working, testified without contradiction that the question of union membership was raised by Spangle in a conversation with him on May 2, and that he planned to request all three men to sign application cards the following day but was injured and hospitalized before he could do so (R. 187).

nor paid the necessary dues and initiation fee (R. 16-17; 213-214).

On the following morning, Friday May 6, Crimmins again went to the woods and, without speaking to Hatfield, asked Herbert J. Johnston, the Company's timekeeper, payroll clerk, and storekeeper in the woods, how he could most expeditiously get a letter to Arthur B. Hood, the Company's General Manager, explaining that he intended to ask for Hatfield's discharge under the union-shop proviso of the collective bargaining agreement between the Company and the Union (R. 17; 75-76, 197).[3] Later in the day Crimmins wrote Hood, requesting Hatfield's discharge for not having joined the Union (R. 17; 226, 195-196).

B. Hatfield's extensive efforts to join the Union

During the noon hour on Tuesday, May 10, Walter D. Hansen, the Company's Logging Superintendent in the woods, told Hatfield that he had heard a rumor that the Union intended to request Hatfield's discharge because he had not joined the organization. Hatfield immediately said that he was perfectly willing to join. Hansen then asked some of the employees within earshot of this conversation if some-

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[3] Johnston testified without contradiction that he protested the precipitousness of Crimmins' action, and suggested that he speak to Hatfield; that Crimmins replied that since he (Crimmins) was being called a "son-of-a-bitch" he might as well act like one; that Johnston then suggested that Crimmins "turn the other cheek" to Hatfield; and that Crimmins replied that he was "out of cheeks" so far as Hatfield was concerned (R. 76)

one could sign Hatfield up. They told Hansen that since Jim Gordon, the union job steward, was ill, Hatfield should go to the camp and see Ernest Dickey, the head woods steward. Hatfield replied that it was difficult for him to get to the camp, but that he would make every effort to do so. (R. 18n; 176-177.)

During the next three days, Hatfield made seven unsuccessful attempts to join the Union:

After quitting time on May 10 he went to the camp and tried unsuccessfully to find Dickey. When Dickey, who had gone fishing, returned to camp, he was told by Harvey Watson, the Union's recording secretary for the woods operation, that Hatfield had been looking for him in order "to sign a card to enter the union." (R. 18; 159.)

At about 6:30 a. m., on the following morning, May 11, Hatfield walked into the Company store and asked Johnston to sign him "into the union." Johnston explained that he did not have authority to do this and suggested that Hatfield see Dickey (R. 18-19; 79-80). After work Hatfield went to Dickey's house but Dickey was not home. Hatfield then went to the Company store and asked Charles Holbert, a landing or side rod foreman, to inform Dickey that Hatfield had been looking for Dickey and wished to join the Union (R. 19; 83).

During this period, Crimmins continued in his determination to have Hatfield discharged. During the morning of May 11, Logging Superintendent Hansen, who believed that Hatfield was sincere in his desire to join the Union, remarked to Crimmins that he

(Hansen) would shortly have Hatfield either join the Union or pay the required dues. Crimmins replied that he had not enlisted the Company's aid in obtaining Hatfield's union membership and that in his letter of May 6, he had asked for Hatfield's discharge (R. 19; 199). That evening, at the regular monthly union meeting of the woods crew, Crimmins informed the group that Hatfield had failed to join the Union, and requested ratification of his written demand to the Company for Hatfield's discharge. Neither Dickey, who presided at the meeting, nor Watson, told the group that Hatfield had expressed a desire to join the Union and had attempted to see Dickey for this purpose (R. 161-162, 218). There is no indication that the group was aware that Crimmins had not spoken to Hatfield. The group ratified Crimmins' discharge demand on the basis that Crimmins reported to them (R. 20 n.; 161-162, 200, 218-219).[4]

On the morning of May 12, just before the camp bus started for the woods, Hansen told Dickey that Hatfield was anxious to join the Union, and that he would like "to get the mess about [him] straightened out." Dickey told Hansen that the matter was out of his hands (R. 19; 178-179, 163-164). At about

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[4] According to the testimony of Dickey and Crimmins, the next night, May 12, the Union held its monthly meeting in Anderson. The minutes of the May 11 meeting of the woods crew, including the ratification of Crimmins' discharge request, were presented to the membership and adopted as read (R. 161, 170, 207, 338). There is no indication in the record that the group was informed of Hatfield's efforts to join the organization.

this time Hatfield saw Dickey sitting in the bus, hurried over to him, and asked him if he had any union cards which Hatfield could sign. The bus started before Dickey could reply (R. 19; 160). Hatfield thereupon returned to the Company store, borrowed pen and paper from Johnston, the company's time keeper and woods store keeper, and wrote and handed Johnston the following note (R. 20; 84-87, 233, 179-180):

> I have offered to join the Union as soon as the papers are offered me to sign I will do so.

Johnston turned this note over to Logging Superintendent Hansen (R. 86). Later in the day, Hatfield approached Dickey in the woods and asked Dickey why he did not have the papers for Hatfield to sign. Dickey replied that the Union had had its crew meeting the preceding night, that everything was beyond his control at that time, and that he could not let Hatfield sign any cards (R. 20; 161).

C. Union Steward Gordon signs Hatfield into the Union

During the morning of May 13, James Gordon, the Shop Steward in the woods to whom Hatfield would normally have applied for union membership, but who had been hospitalized since May 2 (*supra*, n. 2), returned to camp and walked into the store. Johnston discussed Hatfield's problem with Gordon, saying that he felt that the situation had been mishandled. Gordon agreed with Johnston and said that under the circumstances he would be willing to sign Hatfield "into the Union" (R. 21; 88, 89).

After Gordon had left, Johnston prepared the following letter for Hatfield's signature, addressed to the Company for the attention of Hansen (R. 21, 233-234, 89-90):

> Please find enclosed my authorization for the the deduction of Union dues and initiation fees which have been signed by me this date to be considered as nunc-pro-tunc to 1 November 1954.
>
> You are authorized by me to make the deduction from my paycheck in accordance with the enclosed Union deduction slip.

When Gordon returned to the store a few hours later, Johnston showed him the letter, and they went to the woods to find Hatfield (R. 21; 90-91.) Before leaving for the woods, however, Gordon went to his house to obtain some union checkoff forms in order to "sign Hatfield into the union" (R. 21-22; 91). The two men found Hatfield in the woods, and presented him with the letter, together with a union application card and a checkoff slip. Hatfield signed the several documents, and Gordon signed the application as subscribing witness over his official designation as "Job Steward, International Wood Workers of America, Local 13-433" (R. 22; 90-93, 193, 233, 100, 235, 189-190).[5]

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[5] Notices posted by the Union expressly advised the employees that new applicants for membership should "contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared to pay the Initiation Fee . . . and . . . a month's dues. A convenient Check-off Card is provided for both Initiation Fee and

Later that afternoon Hatfield told Gordon that he was sorry he had signed the checkoff slip authorizing the Company to deduct dues from November 1, 1954, because he had found that "the others were not paying back dues" (R. 22; 188).[6] Gordon thereupon destroyed the checkoff slip and prepared another authorizing the checkoff of initiation fee and current dues (R. 22; 234, 98-99). Hatfield signed it and it was then handed to Johnston as was customary (R. 22-23, 26-28; 188-189, 97-98).[7]

On the following day, Saturday, May 14, Gordon told Crimmins that he had "signed up" Hatfield, and attempted to turn over Hatfield's membership application card and the carbon copy of his checkoff slip (R. 23; 189-191). Crimmins, without challenging Gordon's authority, replied that he "wished" that Gordon had not signed up Hatfield because he had asked for Hatfield's dismissal, and told Gordon to

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monthly dues for your convenience" (R. 29; *infra*, p. 23). This notice, introduced in evidence as Respondent's Exhibit No. 8, was inadvertently omitted from the printed transcript of Record. It has been printed as an appendix to this brief, *infra*, p. 23.

[6] No deduction for union dues was made for Spangle or Thomas from November 1954 through April 1955 (R. 27-28; 122, 138-141).

[7] Some time between May 13 and May 15, Johnston noted on the checkoff slip and on the company records that Hatfield's dues were to be deducted beginning with the payroll period commencing May 15 (R. 23; 97). This procedure was in accordance with custom (R. 23; 108-110). The dues of employees signing checkoff slips between the 1st and 15th of the month were normally deducted from the second of the two monthly pay periods (R. 23; 102-103, 123-130).

keep the membership application card and the copy of the checkoff slip "for awhile" (*ibid.*).

D. The Union again demands Hatfield's discharge

On Monday, May 16, Crimmins wrote to the Company and, without mentioning either the union application card or the checkoff slip signed by Hatfield and retained by Gordon at Crimmins' request, stated that he had received a copy of Hatfield's so-called *nunc pro tunc* letter of May 13, that the procedure outlined therein was "illegal" and unacceptable to the Union, and that he again requested the Company to see that the Union's rights under the union-shop clause of the contract were properly observed by the Company (R. 23-24; 227).

The Company complied with the request and discharged Hatfield on May 17 (R. 24; 174-175, 229-230). On May 20, the Company, at Hatfield's request, sent the Union a check for $23.50 to cover his initiation fees and dues for May (R. 24; 140-141, 150, 230-231). The check was returned by the Union with the information that Hatfield was not a member of the Union and was "not eligible" for membership (R. 24; 232, 222-224).

The Company reinstated Hatfield on July 14 (R. 24; 239). On July 21, Hatfield's attorney sent the Union a check for $30.50 to cover Hatfield's initiation fees and dues for April, May, and June 1955, stating that future dues would be deducted by the Company in the usual manner (R. 24; 239). The check was returned by the Union's attorney with the information that Hatfield was not eligible for Union

membership (R. 25; 222-223). Subsequently the Company discharged Hatfield for cause (R. 24; 181).

II. THE BOARD'S CONCLUSIONS OF LAW

In its first decision on the merits of this case, the Board held, in accordance with its decision in *Technicolor Motion Picture Corp.*, 115 NLRB 1607, that the fact that Hatfield had tendered his initiation fee and dues to the shop steward prior to his discharge rendered his subsequent discharge for non-membership in the Union unlawful (R. 48-49). Thereafter this Court set aside the Board's order in the *Technicolor* case, 248 F. 2d 348, stating that the mere fact of belated tender would not automatically protect an employee from discharge under a union-security agreement, and that the Board's failure in that case to discuss alternative grounds (such as the Union's waiver of late tender) precluded the Court from sustaining the order on any such alternative basis (248 F. 2d at 355-356).

The Board thereupon, on its own motion, reexamined its decision in this case in the light of this Court's decision in *Technicolor*. Upon a reconsideration of the entire record, the Board reaffirmed its decision that the Union violated Section 8 (b) (2) and (1) (A) in causing Hatfield's discharge. In so holding the Board announced that, with all respect to this Court, the Board was adhering to the views it had expressed in the *Technicolor* case. In addition, however, the Board expressly stated that as an independent ground for its result it found that the Union

"accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge" (R. 54-56).

III. THE BOARD'S ORDER

The Board's order (R. 50-51) requires respondent to cease and desist from violating Sections 8 (b) (1) (A) and (2), to make Hatfield whole for any loss of wages he may have sustained as a result of the unfair labor practices, and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION, ACTING THROUGH ITS SHOP STEWARD GORDON, ACCEPTED HATFIELD'S TENDER OF DUES AND INITIATION FEES ON MAY 13, AND THEREAFTER VIOLATED SECTION 8 (b) (2) AND (1) (A) BY DEMANDING HIS DISCHARGE FOR NONPAYMENT OF DUES AND FEES

A. Introduction—the issue defined

Although the general scheme of the statute makes it an unfair labor practice to discharge an employee for nonmembership in a union, Congress in the original Wagner Act created an exception to this general rule by permitting an employer and the labor organization representing his employees to enter into an agreement making union membership a condition of employment. 49 Stat. 449, Sec. 8 (3). This exception, which the courts held was to be narrowly construed,[8] was further limited by Congress in Section

[8] *N.L.R.B.* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 694-695; *N.L.R.B.* v. *Don Juan, Inc.*, 178 F. 2d 625, 627 (C.A. 2).

8 (a) (3) and 8 (b) (2) of the Taft-Hartley Act. Congress provided in Section 8 (b) (2) that, even where such an agreement existed, a union could not lawfully cause or attempt to cause the discharge of an employee whose union membership was "denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required" of members. And Congress provided in Section 8 (a) (3) that even under a union security agreement—

> * * * no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *.

In construing these provisions the Supreme Court stated in *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 41, that

> Congress intended to prevent utilization of union security agreements for any purpose other than to compel payments of union dues and fees. Thus Congress recognized the validity of union's concern about "free riders," i. e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

Congress, in short, has limited the lawful discharge of employees under the terms of a union security agreement to "free-riders" unwilling to contribute their fair share to the union's support by paying the regularly required dues and fees. This one exception to an otherwise total prohibition against discharge based on nonunion activities rests solely on a recognition by Congress that a union operating under a union security agreement is entitled to financial support by all who enjoy the benefits of the contract, and is permitted only in order that a union operating under such a contract may effectively insist upon such support.

This Court in *N.L.R.B.* v. *Technicolor Motion Picture Corp.*, 248 F. 2d 348, dealt with an aspect of this problem closely related to that presented in the instant case. In *Technicolor* the employee had failed for several months to pay his initiation fee, and the union demanded his discharge. Thereafter the employee paid the fee, but the union continued to demand his discharge, and the employer eventually discharged him. In that case the Board relied *exclusively* upon its theory that tender of dues at any time prior to discharge protects the employee. On review in this Court it was argued in behalf of the Board that "an alternative ground exists for granting enforcement to the Board's order," namely, that the discharge was not effected until after the required tender had been made (248 F. 2d at 355). This Court, rejecting the Board's main theory, characterized the alternative contention as "not without appeal or merit" (*ibid.*), but held that that issue was

not ripe for review as the Board had not itself passed upon it. Accordingly, the Court remanded that case to the Board.

In the instant case, the Board with all respect adhered to the proposition which this Court rejected in *Technicolor*.[9] In addition, however, the Board expressly advanced an alternative ground for its holding, namely, "that the [Union] accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge" (R. 54). We devote the remainder of this brief to a consideration of the facts which support this finding.

B. The Board properly found that the Union accepted Hatfield's tender, and thereby waived his delinquency as a ground for discharge

In the *Technicolor* case, this Court observed that "an employee must not remain perpetually vulnerable to discharge because of tardiness in submitting initiation fees, irrespective of the conduct engaged in by the union or the employer. Either the employer or the union may be estopped from asserting its particular rights under the collective bargaining agreement." 248 F. 2d at 356. We submit that on this record the Board properly found such an estoppel or waiver.

We start, of course, with the fact that Hatfield had been "delinquent" in the sense that under the contract between the Company and the Union he was

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[9] In deference to this Court's ruling in that case we shall not reargue the point here, although we have duly preserved it (R. 63) in the event of further review.

vulnerable to discharge for failing to join the Union within 30 days of being employed. The Union, however, had not pressed for strict observance of the 30-day requirement, for it had not only expressly condoned the failure of Hatfield, Spangle, and Thomas to join the preceding fall, but it had waited for nearly two months after the opening of the spring season before requesting the three men to sign membership cards (*supra*, p. 3). On Thursday, May 5, 1955, Spangle and Thomas effected their acquisition of union membership in the customary and accepted way by signing the cards proffered them by the head steward, Dickey. Hatfield, acting so far as the record shows in the utmost good faith, declined to sign the card because he believed, albeit mistakenly, that he had signed such a card the preceding fall.

At this point, the Union had manifestly "waived" the delinquency of Thomas and Spangle, but of course Hatfield's mistake did not bind the Union and, as of this date (May 5), he was still delinquent and the delinquency had not been waived. Business Agent Crimmins was therefore acting within the scope of his authority when, on the very next day and without even attempting to see Hatfield and point out the latter's mistake, he wrote the Company demanding Hatfield's discharge.

To concede, as we do, that Crimmins was technically warranted in calling for Hatfield's discharge is not to suggest that Crimmins acted reasonably or in good faith under the circumstances. Hatfield, after all, had not expressed unwillingness to meet

his obligation to the Union, but simply had expressed a mistaken belief that he had previously signed an application card. A company official had suggested to Crimmins that his action was unduly precipitous, and Crimmins' reply, quoted *supra*, p. 4, n. 3, as well as his subsequent actions establish that he was concerned with firing Hatfield, rather than with getting him into the Union even one day after Thomas and Spangle were accepted. Indeed, Crimmins said as much to Logging Superintendent Hansen (*supra*, p. 6) and to Union Steward Gordon (*supra*, p. 9).

Had the Company discharged Hatfield when it received Crimmins' letter of May 6, we could not contend that the Union had waived its right in his case as it had in the cases of Spangle and Thomas. But the Company did not fire Hatfield in response to the May 6 demand. Meanwhile, beginning May 10, Hatfield engaged in repeated and sterenuous efforts to join the Union,[10] but he was at first unable to locate the proper union official. Eventually, however, on May 13, Shop Steward Gordon signed Hatfield into the Union. At this time Hatfield was still in the Company's employ, and not until after receiving Crimmins' second letter demanding Hatfield's dis-

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[10] See *N.L.R.B.* v. *Aluminum Workers,* 230 F.2d 515, 520 (C.A. 7): "Against this background of [the dischargee's] attempt to pay her way, respondent's action in demanding her discharge becomes the more suspect, and it would appear that 'nonpayment of dues' was asserted as a lily-white front to cloak a demand for her discharge based on some other reason best known to respondent's officials."

charge, written several days after Gordon signed Hatfield into the Union, did the Company discharge Hatfield. It is our position that by the time of Crimmins' second letter to the Company—i. e., by the time of the "operative demand" for Hatfield's discharge [11]—he had been accepted into the Union precisely as had Thomas and Spangle, and the Union had therefore waived its right to demand his discharge.

Hatfield was accepted into the Union, as were Spangle and Thomas, by signing the authorization card which Union Steward Gordon handed him and which Gordon thereupon endorsed in his official capacity. Hatfield's checkoff authorization was then turned over to the Company in the customary way (*supra*, p. 9). This was the method of joining the Union expressly provided for in notices posted by the Union and in its agreement with the Company (R. 55-56; *infra*, p. 23).

Gordon's status as a union agent with authority to "sign up" new employees is fully established by the record. Gordon's task as job steward was to sign up new employees and collect union dues (R. 191-192, 202-203). The testimony of Dickey, the Union's vice president, to the effect that he "took it upon himself" to request Thomas, Spangle, and Hatfield to sign union application cards on May 5, because the stewards were ill and because he happened to find himself working next to the three men on detail that day (R. 157-158), indicates that the Union looked

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[11] *N.L.R.B.* v. *Aluminum Workers*, 230 F. 2d 515, 520 (C.A. 7).

primarily to the stewards rather than to any other union officers to perform this duty.

The Union has not contended, nor can it successfully contend, that the ratification of Crimmins' discharge demand, voted by the woods crew on May 11 and by the union membership in Anderson on May 12, either curtailed or modified the authority of Gordon in his capacity of shop steward to accept Hatfield's membership application and checkoff slip on May 13. Gordon had been in the hospital when the ratification had been voted and was unaware of it on May 13. The Union had failed either to inform him of this action or to modify his authority to sign Hatfield into the organization (R. 55-56; 170). Absent such information or modification of authority, that authority, and the power to bind the Union by its exercise, continued under well established principles of agency. *Hall* v. *Union Indemnity Co.*, 61 F. 2d 85, 91 (C.A. 8), certiorari denied, 287 U.S. 663, and cases cited; 2 Am. Jur., Agency, Sec. 41-42, 44; 2 C.J.S., Agency, Sec. 77b. See also, this Court's decision in *N.L.R.B.* v. *Cement Masons Local No. 555*, 225 F. 2d 168, 174, holding the union liable for a foreman's action which was within his authority under the union's working rules, although the authority had been revoked, unbeknownst to him, in this particular instance (225 F. 2d at 171, n. 3).

That Gordon had continuing authority on behalf of the Union to deal with Hatfield appears not only from general principles of agency but from testimony in this record. When Gordon attempted to hand Crimmins Hatfield's membership application and

checkoff slip, Crimmins said that he "wished" Gordon had not signed up Hatfield and told Gordon to keep the documents "for a while" (*supra*, pp. 9-10). Dickey, the head steward, told Gordon after the signing of Hatfield that he (Dickey) should have informed Gordon of the Union's ratification of Crimmin's demand for Hatfield's discharge (R. 170). Thus it is clear that Dickey and Crimmins regretted, but did not question, Gordon's authority with respect to Hatfield even after the Union's ratification of the discharge demand.[12]

In his discharge demand of May 16, Crimmins stated that the procedure outlined for the tender of Hatfield's initiation fee and dues in Hatfield's so-called *nunc pro tunc* letter of May 13 (*supra*, p. 10) was "illegal and cannot be accepted by the union," and by implication based his discharge demand on the ground that no valid tender had been made. This ground was without substance. Crimmins was fully aware at that time that Hatfield's tender of initiation fee and dues had also been made and accepted by Gordon in accordance with approved union procedure on forms provided by the Union for that purpose. Crimmins' failure to mention this valid tender coupled with the fact that he mentioned only the allegedly "illegal" tender outlined in the

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[12] When Gordon was asked at the hearing whether he would have accepted Hatfield's application and checkoff slip if he had known of the Union's ratification of the discharge demand, he said "I probably wouldn't have" (R. 56; 194). The question of what Gordon might have done if circumstances had been different is not, however, an issue in the case.

nunc pro tunc letter constituted a misrepresentation of the facts.[13]

To recapitulate, the Union had accepted Hatfield into membership in the customary fashion before Crimmins wrote his letter of May 16 demanding Hatfield's discharge for non-membership. It was the

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[13] The true motive behind Crimmins' demands for Hatfield's discharge is not clearly revealed by the record. Since Hatfield, Thomas, and Spangle were all specifically permitted by Crimmins to defer union initiation and the payment of dues from December 1954 until the commencement of the woods operation in March 1955 and since the Union then made no move to sign them up until May, after Spangle had brought the matter to Gordon's attention (*supra*, p. 3), it seems unreasonable to suppose that compliance with the 30-day clause of the contract was of pressing importance to the Union. Crimmins' haste in demanding Hatfield's discharge without notifying Hatfield, although he knew that Hatfield had expressed a belief that he had already signed a union application card, together with the explanation of this haste, given the disapproving Johnston, that since Crimmins was "supposed to be a son of a bitch," he would "act like one," and that he was "out of cheeks to turn" to Hatfield (*supra*, p. 4), may well indicate that he was motivated by a particular animosity toward Hatfield. Such a supposition is strengthened by Crimmins' continued adamant insistence upon Hatfield's discharge, as late as May 16 on the alleged ground that Hatfield's *nunc pro tunc* letter was "illegal" although Crimmins was aware at that time that Hatfield had been "signed up" by a qualified union steward, and that a tender of initiation fee and dues had also been made by the procedure approved by the Union, and had been accepted by the steward and transmitted to the Company. It may be noted that Hatfield was openly hostile to the Union (R. 208-209), but his right to oppose the Union was protected by Section 7, and could not be the basis of lawful discrimination against him. Cf. *Aluminum Workers*, quoted *supra*, p. 17 n. 10.

May 16 letter, and not the earlier letter, which caused the discharge. Hatfield's union status at the time of the May 16 letter was precisely the same as the status of Thomas and Spangle, whose discharge was never requested in either letter. It follows, as the Board found, that the Union had waived Hatfield's earlier delinquency, and could not rely on his nonmembership in seeking his discharge. As the Union's discharge demand was not protected by the proviso to Section 8 (a) (3), the Union violated Section 8 (b) (1) (A) and (2) of the Act. *Communication Workers of America* v. *N.L.R.B.*, 215 F. 2d 835, 839 (C.A. 2); *N.L.R.B.* v. *Pape Broadcasting Co.*, 217 F. 2d 197, 199 (C.A. 5).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's petition for the enforcement of its order should be granted in full.

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OCTOBER 1958.

APPENDIX A

Respondent's Exhibit No. 8

WARNING

New Employees

The Union Shop Clause in the Contract between the Ralph L. Smith Lumber Company and Local Union No. 13-433, IWA-CIO, states:

"Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the Union as a condition of employment shall become and remain a member of the Union."

It is essential that new applicants for membership contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared to pay the Initiation Fee, which is $20.00, and $3.50 for a month's dues. A convenient Check-Off Card is provided for both Initiation Fee and monthly dues for your convenience.

The Business Agent is charged with the responsibility of enforcing the Union Shop clause, and any employee going over his or her 30-day period, and not having joined the Union, his or her discharge from employment will be IMMEDIATELY demanded.

BUSINESS AGENT

LOCAL 13-433, IWA-CIO

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a

condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * * *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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